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8 IN THE UNITED STATES BANKRUPTCY COURT  
9 FOR THE SOUTHERN DISTRICT OF NEW YORK  
10 MANHATTAN DIVISION

11  
12 IN RE:

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14  
15 RESIDENTIAL CAPITAL, LLC, *ET*  
16 *AL.*

17  
18 Debtors.)

) BANKRUPTCY CASE No. 12-12020-MG  
) CHAPTER 11  
)  
) Jointly Administered  
) (Executive Trustee Services, Case No. 12-  
) 12028)  
)  
) **CLAIMANT'S RESPONSE TO DEBTOR'S**  
) **MOTION FOR SUMMARY JUDGMENT**  
)  
) [Claim No. 4445]  
) Hearing Date: February 28, 2017  
) Hearing Time: 11:00 A.M.



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1 **INTRODUCTION**

2 The debtor in this action, ResCap(hereinafter the “Trust”), moves for summary  
3 judgment on the *sole* basis that Claimant “...was in default under the terms of the Loan. As a  
4 result, the owner of the Loan had every right to conduct the foreclosure sale. Had ETS acted  
5 differently and ensured that it was properly appointed as substitute trustee prior to conducting  
6 the sale, the foreclosure sale would still have gone forward. As a result, the foreclosure sale  
7 was caused by Mr. Moss’ default on the terms of his loan, not the actions of ETS.”<sup>1</sup> This is  
8 *not* the basis for which the Trust sought permission from this Court to file a summary judgment  
9 motion.<sup>2</sup> Furthermore, this statement is a clear error of law: just because a homeowner *might*  
10 be in default, does not excuse the trustee, or a putative trustee, from complying with California  
11 statutes designed and intended to control the trustee’s activities. As but one example, the  
12 trustee cannot act independently, but must be instructed to initiate foreclosure proceedings as  
13 a first step. There is *no* evidence in the Trust’s motion that this trustee was ever asked to  
14 initiate foreclosure proceedings. The undersigned has requested such documentation on  
15 multiple occasions and it has never been produced.<sup>3</sup>

16 Further, the motion is replete with references to, and records of, the Trust, i.e.  
17 GMAC. The motion does *not* contain even one page of records from ETS, the actual entity  
18 against whom this claim is directed.<sup>4</sup> Despite numerous requests, a court hearing, further  
19

20 <sup>1</sup> Brief of Movant/Debtor at ¶2(ECF Doc. # 10290, filed January 23, 2017).

21 <sup>2</sup> Cf. Letter from Jordan Wishnew to the Court, December 27, 2016(ECF Doc.# 10273).

22 <sup>3</sup> In FN. 2 of its brief, the Trust asserts that it has not received discovery responses from the claimant. Those  
23 responses were timely served by the requisite date and time of the Court Order. It is known from a subsequent conversation  
that the responses were received.

24 <sup>4</sup> ETS stands for Executive Trustee Services, LLC and/or Executive Trustee Services, Inc. and/or  
25 ETS Services, Inc. Each was used interchangeably in different documents that were officially recorded with  
26 the County of San Mateo.

1 discovery requests and the production of over 700 pages of largely meaningless, misleading  
2 and obfuscating documents, Claimant still has not been given a *single* piece of paper  
3 originating from ETS. It begs credulity that a major company, acting as a trustee in hundreds,  
4 if not thousands, of foreclosures, did not maintain any records. Pointedly, none of the  
5 discovery responses from the Trust stated that ETS did not maintain any records. Indeed, how  
6 could they? They are required by California law. The Trust simply decided not to produce any  
7 ETS records. If one looks at the Declaration of Sara Lathrop, filed with the Trust motion, (ECF  
8 Doc. 10290-7), she states at ¶3 that she has reviewed *inter alia* “information supplied or verified  
9 by former personnel in departments within the Debtor’s various business units”; yet she  
10 evidently couldn’t find one piece of paper from ETS relevant to this claim. Here is but one  
11 glaring example: she states at ¶8 that “According to the debtors books and records, no eviction  
12 proceedings were ever commenced against Mr. Moss....” This singular, supposedly factual  
13 assertion is the basis for the Trust’s arguments; yet it is totally false. There were two such  
14 actions, and one of them was pursued in direct violation of a Court Order.<sup>5</sup>

15 **I.**

16 **THIS MOTION FOR SUMMARY JUDGMENT**  
17 **IS PREMATURE AND SHOULD BE DISMISSED OR “TABLED”**

18 On August 24, 2015, the Bankruptcy Court sustained the debtor’s objection to  
19 Claimant’s claim. On June 2, 2016, claimant’s appeal of that decision to the District Court was  
20 decided: the District Court *reversed and remanded* the Opinion of the Bankruptcy Court with  
21 instructions, to wit: “for further proceedings consistent with this Opinion.” he District Court  
22 noted that *inter alia* “ETS should not have conducted the foreclosure sale of the Property, but  
23 did so “in error,” according to the Trust, “due to a failure to timely communicate conditions that  
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25 <sup>5</sup> See Exhibit N, Declaration of Alan Moss, to the Trust’s supporting documents, ECF Doc.#10290-15  
26



1 would have warranted a cancellation of the foreclosure.” In other words, ETS sold Moss’s  
2 property when it should not have, because of a “failure” to communicate, intentional or not, by  
3 an unidentified person to another unidentified person. The Trust’s statement obfuscates  
4 whether the failure to communicate was innocent, reckless or intentional and any role of ETS  
5 leading up to the improper sale.”<sup>6</sup> The District Court further stated, “The Bankruptcy Court  
6 Opinion cites declarations and exhibits that, as discussed above, support a plausible finding  
7 that ETS acted “in reckless disregard of the plaintiff’s rights,” which is a state of mind sufficient  
8 to show malice [citation omitted]. Consequently, the Bankruptcy Court erred in sustaining the  
9 objection and disallowing the Amended Claim ....”<sup>7</sup>

10 To date, the Bankruptcy Court has taken no actions pursuant to the instructions  
11 of the District Court. The District Court questioned the analytical bases of the Bankruptcy  
12 Court in sustaining the debtor’s objection. Further, the District Court found that the requisite  
13 inquiry into the factual underpinnings of the claim was warranted and should be undertaken by  
14 the Bankruptcy Court. The District Court was troubled by the facts of this claim, and wanted  
15 further inquiry into the factual matters surrounding this claim.

16 It would be error to entertain a *subsequent* motion, based on different grounds,  
17 let alone a dispositive motion, prior to following the directions of the District Court contained  
18 in its Opinion, ordering a re-examination of its Decision. Should the Bankruptcy Court follow  
19 the dictates of the District Court, and render a finding that ETS acted with malice, the result  
20 would be that the Trust’s Objection to the Amended Claim would be denied, and consequently,  
21 the Amended Claim approved for the rolls. There would be no Motion For Summary Judgment.

22 Therefore, it is respectfully suggested that the instant Motion For Summary  
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24 <sup>6</sup> See Decision at P. 15.

25 <sup>7</sup> *Id.* at P. 17.  
26

Judgment should be disallowed or tabled, and the Bankruptcy Court should re-visit its decision striking the claim from the rolls and issue a new decision consistent with the holding of the District Court. *See UTE Indian Tribe vs. State of Utah* (CA 10, 1997) 114 F.3d 1513 (“...a district court “must comply strictly with the mandate rendered by the reviewing court...[citations omitted]...Under the ‘law of the case’ doctrine, the district court may not deviate from the appellate court's mandate.”<sup>8</sup>

## II.

### STANDARD ON SUMMARY JUDGMENT

Under FRCP 56, applicable to these proceedings, summary judgment may be granted only where there is an absence of any genuine issue of material fact. *T.W. Electric Service, Inc. vs. Pacific Electric Contractors* (9th Cir. 1987) 809 F.2<sup>nd</sup> 626, citing *Celotex Corp. vs. Catrett* (1986) 477 U.S. 317, 106 S.Ct. 2548.

Summary judgment is a drastic remedy and therefore is granted cautiously: “Neither do we suggest that the trial courts should act other than with caution in granting summary judgment.” *Anderson vs. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 255; 106 S.Ct. 2505.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. If done, the burden then shifts to the nonmoving party to “go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, or admissions on file designate “specific facts showing that there is a genuine issue for trial.” *Celotex vs. Cartett*, 477 U.S. 317, 106 S.Ct. 2548 (1968). The court’s function is not to make credibility determinations. *Anderson vs. Liberty Lobby Inc.* (1986) 477 U.S. 242, 106 S.Ct. 2505. The inferences to be drawn from the facts must be viewed in a light most favorable to the party

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<sup>8</sup> In California, a reversal with directions requires specific further proceedings in the trial court. *Styne vs. Stevens* (2001) 26 Cal.4th 42, 61. *Hampton vs. Superior Court* (1952) 38 Cal.2d 652.

1 opposing the motion. *T.W. Electric VS. Pacific Electric Contractors*(9<sup>th</sup> Cir. 1987), 809F.2<sup>nd</sup> 626.

2 **III.**

3 **UNDERLYING FACTS RELEVANT TO THIS MOTION**

4 On July 22, 2009, this claimant filed a lawsuit against The Bank Of New  
5 York(hereinafter “BONY”), who as the latest *alleged* assignee on title, was attempting to  
6 foreclose on claimant’s home. *See Moss vs. The Bank of New York*, Action No. 486130, Superior  
7 Court of California, County of San Mateo. The complaint alleged multiple causes of action,  
8 asserting essentially wrongful foreclosure and related causes of action.<sup>9</sup> The action was  
9 removed to Federal District Court shortly thereafter.<sup>10</sup> The action remained there until July 5,  
10 2012 when it was remanded back to the California Superior Court, San Mateo County for lack  
11 of diversity: the District Court found that BONY had lied to the Court about its citizenship .  
12 During the time that the action was in the District Court, the complaint was subjected to three  
13 motions pursuant to FRCP 12(b)(6), and was amended three more times, resulting in the  
14 operative complaint entitled Fourth Amended Complaint, filed in the U.S. District Court on  
15 November 22, 2011. This action was resolved four years later, by agreement of the parties, in  
16 November 2013.

17 As a separate and distinct matter, claimant filed a separate lawsuit against a  
18 different entity, Executive Trustee Services, LLC(hereinafter “ETS”), the *alleged* trustee, for  
19 *negligence*. *See Moss vs. Executive Trustee Services, LLC et al.*, Action No. 505386, filed May  
20 5, 2011. This lawsuit was based on theories of negligence, negligence *per se*, fraud , and  
21 intentional infliction of emotional distress . It was not founded on anything to do with wrongful

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22  
23 <sup>9</sup> The original complaint, as filed, alleged causes of action for (1) set aside trustee sale due to sale being void, (2)  
24 set aside trustee sale due to sale being voidable, (3) set aside sale as to Lot 20 as void, (4)estoppel, (5) quiet title, (6)  
intentional infliction of emotional distress, (7) breach of contract, (8) violation of one action rule, (9) accounting, and  
(10)cancellation of recorded documents. No cause of action sought money damages.

25 <sup>10</sup> The Federal court assigned the action number of CV-10-1734 JSW to this action.  
26

1 foreclosure. It did not seek to undo the foreclosure sale. It sought monetary damages only.  
2 When defendant failed to answer for six months, Claimant took the default of ETS. In California,  
3 default is taken first, then judgment by default is taken as a separate matter in a prove-up of  
4 damages. This bankruptcy action was filed a few days prior to this hearing date, staying that  
5 action. It remains stayed to this day.

6 During this litigation, it was discovered that the Trust owned and operated ETS.<sup>11</sup>  
7 As a result of this, when ResCap declared bankruptcy, ETS also filed a petition in bankruptcy.  
8 See Action No. 12-12028, filed May 14, 2012 as Doc 1.

9 This Claim resulted from and is specifically based on this lawsuit against ETS.  
10 The Claim, and the Amended Claim which is in issue in this motion, specifically incorporated  
11 the Complaint as a basis for the this Claim. As of the date this lawsuit was stayed, the status  
12 of the case was that ETS had been defaulted by the San Mateo County Superior Court, because  
13 it had failed to respond to the complaint for more than nine months. The ETS complaint detailed  
14 the chain-of-title of the underlying loan, all from the recorded documents, and demonstrated  
15 that ETS was not properly substituted in as a trustee of the loan: under California law, an entity  
16 may be substituted in as trustee, provided that the present beneficiary(ies) record the  
17 substitution. In this case, as can be seen from the recorded documents, it was TCIF who  
18 recorded a Substitution of Trustee, on November 10, 2006, naming ETS as the trustee. TCIF was  
19 not assigned the loan for seven more months, until June 16, 2008. Chronologically, this can be  
20 put succinctly thusly:

21 **CJ MORTGAGE(6/22/05)[ORIGINAL LOAN]**  
22 ↓  
23 **Assigned To OPTION ONE MORTGAGE**  
**(BY ASSIGNMENT FROM CJ MORTGAGE DATED 6/27/05, RECORDED 4/4/07)**

24 <sup>11</sup> ETS was known, derived from official documents filed by it, as Executive Trustee Services, LLC  
25 and Executive Trustee Services, Inc. and as ETS Services, Inc. All three entities are referred to herein as  
26 "ETS."

20

The ETS lawsuit alleged that, *inter alia*, ETS was negligent when it issued the requisite notices required by California law to promulgate a foreclosure proceeding, to wit: (1) Notice of Default, (2) Notice of Trustee Sale, and (3) Trustees Deed Upon Sale. As can be seen from the diagram, ETS was made trustee by an entity that would *not* be assigned the loan for almost two years. Thus, TCIF had no power to substitute ETS, and therefore ETS had no power to issue any of the three notices. And BONY was assigned the loan by TCIF, LLC who had not yet been assigned the loan, and so had no ownership rights and no power to instruct ETS to foreclose.

ResCap concedes that ETS was illegally appointed and agrees that ETS had no power to issue any notices required by statute.<sup>12</sup>

<sup>12</sup> The Trust's response to Interrogatory no. 2 states: "According to the relevant assignments, it appears that TCIF REO2, LLC did not have the authority to substitute a trustee at that time. As a result, the Borrower Trust does not claim that Executive Trustee Services, LLC was lawfully appointed as Trustee of Deed of Trust No. 15070373 at that time." A similar response was received as to Request For Admission No. 15 and 27. These documents are attached to the Declaration of Alan Moss filed herewith.

1 Because the entity(TCIF) which substituted ETS was not the beneficiary, and  
2 would not become the beneficiary, if at all, for eighteen months, ETS could not have had any  
3 reasonable grounds for believing that it had been properly appointed as trustee. ETS received  
4 no communication, either written or oral, demonstrating to it that the entity which named it as  
5 trustee had the power to do so. ETS received no communication, either oral or written, that  
6 demonstrated to it, or to any other reasonable individual or entity, that it was legally substituted  
7 in as trustee. ETS made no inquiry of recorded documents in order to verify that it was legally  
8 entitled to issue any notices or even if the entity that named it trustee existed or was the  
9 beneficiary or had the power to do anything.<sup>13</sup>

10 Further, in the underlying case, GMAC/ResCap made four separate motions to  
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12 <sup>13</sup> ETS, as a subsidiary of GMAC/ResCap, at all times relevant hereto, was represented by the same office and same  
13 individual within GMAC, to wit the Litigation Case Manager(" LCM"), who was responsible for the control of all litigation  
14 concerning claimant, both as to ETS and the wrongful foreclosure action. The same attorney represented both  
15 GMAC/ResCap and ETS. Said LCM admitted under oath that she knew of both the underlying case and the ETS case, that  
16 she was the LCM for both cases, and was periodically advised of the status of each case and the allegations of claimant. At  
no time did said LCM, despite notice of illegal substitution of ETS, make inquiry of said allegations, and determine the truth  
or lack of truth of the allegations. As a result, this matter was allowed to be litigated for more than four years; the two cases  
overlapped for more than two years. Never during this time was it admitted that the substitution of ETS was illegal and of  
no force and effect.

17 Further, during the course of this litigation, claimant herein(plaintiff in the underlying case), posed  
18 multiple discovery questions to GMAC/ResCap beginning in 2009, and continuing thereafter through 2013, including  
19 interrogatories, requests for documents, requests for admission, subpoenas for documents and individuals, all to ascertain any  
20 documentation regarding the substitution of ETS as trustee, and to determine the validity or invalidity of said substitution.  
Said discovery requests were routinely forwarded to the LCM for responses and information in order to be responded to.  
Throughout these four years and the multitude of discovery requests and motions to compel, filed in both California and  
Federal courts, GMAC/ResCap failed and refused to acknowledge that ETS was improperly substituted as trustee. Not until  
ResCap's Objection to this claim was it admitted.

21 Further, claimant caused to be served subpoenas duces tecum on each entity of ETS for business records  
22 concerning the loan and claimant. ETS refused to produce any records. Claimant is informed and believes, and on this basis  
23 alleges, that there was a program and practice at GMAC and ETS to foster foreclosures by any means necessary, including  
24 fraudulent notarizations of documents and other documentations, in order to finalize foreclosures, even by methods and means  
25 that did not comport with state law. Because of this, ETS was engaged in practices, the likes of which resulted in a failure  
26 to comport with state law. GMAC was held in contempt of court in numerous jurisdictions throughout the United States  
because of these practices, which have been well documented throughout the mortgage crisis. In point of fact, the individual  
who notarized some of the relevant documents in this matter, an employee of GMAC, was held in contempt on more than  
one occasion, and another GMAC employee who notarized other documents in this matter was sanctioned for notarizing  
unsigned documents. The fact that ETS allowed itself to act as trustee, notwithstanding any basis for believing that it was  
duly appointed, is another example of this pattern and practice.

1 dismiss pursuant to FRCP 12(b)(6); as a result of these motions, the latest amended complaint,  
2 the Fourth Amended Complaint, contained a cause of action for Intentional Infliction of  
3 Emotional Distress, which remained a viable cause of action, the District Court denying the  
4 motion to dismiss as to this cause of action. *See Moss vs. BONY*, Action No. 10-1734(N.D. Cal.),  
5 Order, p. 3 AT 5-11, dated February 16, 2012, ECF Doc.# 94.

6 Therefore, ETS lacked reasonable grounds for believing that it had the power to  
7 issue any requisite notices, or in the truth of the information contained in the notices it issued  
8 and therefore acted in reckless disregard of the rights of claimant. ETS acted in reckless  
9 disregard of the rights of claimant from the initiation of litigation in July 2009 up to, and  
10 including, the present time. ETS possessed no information, at no time, that it had been properly  
11 substituted as trustee, and despite years to ascertain the truth, and despite having been placed  
12 on notice that it had no power to act as trustee, failed to take any steps or to make any inquiry  
13 regarding whether it had been properly appointed and substituted. Therefore, ETS lacked any  
14 grounds, let alone reasonable grounds, to believe it had the power to issue any requisite notices  
15 in this matter, and therefore ETS acted in reckless disregard of the rights of claimant.

16 **IV.**

17 **DEBTOR MISUNDERSTANDS THE CALIFORNIA STATUTORY STRUCTURE**  
18 **AND MISREPRESENTS CALIFORNIA CASE LAW**

19 The Trust goes to great lengths in its motion to try to eliminate the causes of  
20 action of the ETS complaint. In effect, in ¶¶27-33 of its motion, the Trust argues that it is of no  
21 moment that ETS violated, directly, distinctly and *admittedly*, the controlling statutes on  
22 trustees in foreclosure proceedings; it does not matter, the Trust argues, because Claimant was  
23 in default. Put more succinctly, the Trust argues that if a noteholder is one payment behind,  
24 that is sufficient, in and of itself, to render the California Civil Code absolutely nugatory. That  
25  
26

1 isn't the law, and cannot possibly be the law.<sup>14</sup>

2 In California, the power of sale allowed in a non-judicial foreclosure process is a  
3 creature of statute<sup>15</sup>, and any attempt to invoke the power of sale must be strictly construed in  
4 order to insure compliance with these statutory requirements:

5 "The power of sale under a deed of trust will be strictly construed, and in its execution the  
6 trustee must act in good faith and strictly follow the requirements of the deed with respect  
7 to the manner of sale. The sale will be scrutinized by courts with great care and will not be  
sustained unless conducted with all fairness, regularity and scrupulous integrity." *Pierson vs.*  
*Fischer*(1955) 131 Cal.App.2<sup>nd</sup> 208, 214.

8 "Statutory provisions regarding the exercise of the power of sale provide  
9 substantive rights to the trustor and limit the power of sale for the protection of the  
trustor. (*Ibid.*)" *Bank of America, N.A. vs. La Jolla Group II*(2005) 129 Cal.App.4<sup>th</sup> 706.

10 "No nonjudicial foreclosure of a security interest in real property is permitted  
11 except in compliance with this statutory system. Cal.Civ.Code §2924....Strict compliance  
with the statutory requirements is obligatory: any statutory deficiency requires that the sale  
be set aside., *Anderson vs. Heart Federal Savings*(1989) 208 Cal.App.3<sup>rd</sup> 202." *In Re Tome*  
12 (1990) 113 B.R. 626, Bkrtcy C.D. Cal.

13 By reviewing the chronology of events in this case, it is indisputable that the  
14 entity which "substituted" ETS as trustee and attempted to "game the system" so as to  
15 empower ETS with the power of sale, had no authority or power to do so. ETS could have  
16 easily and readily discovered its lack of power in five minutes on-line(*Cf. Bergman vs. Bank of*  
*America*, 2013 WL 5863057, relied on by the Trust, where the Court found the trustee couldn't  
17

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18  
19 <sup>14</sup> California Civil Code §3541 states: "An interpretation which gives effect is preferred to one which makes void."  
Further "A statute should never be construed so strictly as to render it absurd or nugatory." *In re Los Angeles Lumber* (DC  
20 Cal 1942) 45 F.Supp.77, "Statutes should be construed as to make them effective or operative rather than inoperative. *Van*  
*Dorn vs. Couch*(1937) 21 Cal.App.2d Supp 749.

21 The court in *Residential Capital vs. Cal-Western Reconveyance*(2003) 108 Cal.App.4<sup>th</sup> 807 held that, in a case  
involving interpretation of the California foreclosure statutes, must be "...determined by "principles of interpretation of the  
22 statutory scheme setting forth the rules of trust deed nonjudicial foreclosure sales." *Id.* at P.172. See also *California Golf,*  
*L.L.C. v. Cooper*(2008) 163 Cal.App.4<sup>th</sup> 1053, 1070-1071 [availability of particular remedy determined by consideration  
of "the policies advanced by the statutory scheme, and whether those policies would be frustrated by the allowance of the  
23 additional remedy"]; *I.E. Associates v. Safeco Title Ins. Co.*(1985) 39 Cal.3d 281, 285; *Moeller v. Lien*(1994) 25  
Cal.App.4<sup>th</sup> 822, 834. Thus, "[t]he trustor is protected from unauthorized foreclosure and loss of its property and the  
24 sanctity and finality of foreclosure sales is maintained without significant prejudice to the high bidder." See also *Pro-Value*  
*Properties vs. Quality Loan Service Corp.*(2009) 170 Cal.App.4<sup>th</sup> 579.

25 <sup>15</sup> Civil Code §§2924 - 2924h.  
26



1 have discovered its lack of authority.)<sup>16</sup>

2 **A. THE NEGLIGENCE CLAIM**

3 The elements of negligence on the part of ETS have more than amply been  
4 satisfied.

5 Debtor argues that of the requisite elements of negligence in California, claimant  
6 cannot demonstrate that (1) ETS owed him a duty, and (2) claimant was damaged by ETS's  
7 actions. Both assertions are false. The argument of the Trust, at ¶29, is that "...all of these  
8 damages are the result of Foreclosure Proceedings being commenced against him by the owner  
9 of the Loan, Bank of New York." The Trust first argues damages, then argues duty. They have  
10 it just in reverse.<sup>17</sup>

11  
12 <sup>16</sup> TCIF had not yet been assigned the deed of trust, and from the face of the documents, would not take by  
13 assignment for a minimum of eight months, most probably eleven months, and possibly twenty months (because of the white-  
out, cross-out and evident changes to the document), after attempting to substitute a new trustee. It could have just as easily  
been "Joe Schmo" that signed and issued the Notice of Default, the Notice of Sale and the Trustee's Deed.

14 ETS could have been given no power to act in this matter because TCIF had no power to do anything, let alone  
15 substitute a new trustee. Under the statute, it is the *present* beneficiary that has the power to substitute a new trustee—but  
16 TCIF was not the beneficiary at the time it substituted ETS as the trustee. And under the deed of trust, only the beneficiary  
had the power to substitute the trustee, and again TCIF was NOT the beneficiary on November 10, 2006 when the purported  
substitution was recorded. On that date, it was Option One who was the beneficiary and Option One had already substituted  
Premier Trust Deed Services; Option One never substituted ETS as trustee.

17 Because ETS was not duly substituted in as the trustee, ETS had no authority, *ab initio* or ever, to this  
day, to issue the Notice of Default, to issue the Notice of Trustees Sale, or to issue the Trustees Deed by which defendant  
purports to claim title.

18 On September 17, 2007, when the Notice of Default was issued by ETS, it was not the trustee, nor was  
it the mortgagee, nor was it the beneficiary, nor was it the authorized agent of any of these. And TCIF REO2 was none of  
these either.

19 On September 21, 2006, the date that defendant claims the trustee was substituted, Option One was the beneficiary  
of record—not TCIF and not BONY. No further substitution has ever been recorded, and indeed the defendant herein does  
20 not argue that there was. Pointedly, the defendant offers to this court the substitution document dated September 21, 2006  
as providing the authority for invoking the entire procedure by which it claims the right to the property; i.e., that ETS was  
the properly substituted trustee which then made all of its subsequent actions legitimate.

21 Bernhardt, *California Mortgages, Deeds of Trust and Foreclosure Litigation*, 4<sup>th</sup> Ed., §2.25 states: "A party who  
22 is not a trustee of record will not have the authority to conduct the foreclosure or deliver a valid trustee's deed." See *Pro*  
*Value Props., Inc. Vs. Quality Loan Service Corp.* (2009) 170 Cal.App. 4<sup>th</sup> 579.

23 <sup>17</sup> In asking for permission to file this motion, the Trust cited one case for its assertion that ETS did not owe a  
24 duty to Claimant. *Cedano vs. Aurora Loan Services* (BAP 9<sup>th</sup> Cir. Cir. 2012), which the Trust states held "that a  
25 plaintiff could not assert that a substitute trustee breached a duty of care by alleging that the trustee did not sufficiently ascertain  
the validity of the foreclosure documents." This case does not so hold: it only holds that the MERS system was authorized  
26 to name a substitute trustee because it was part of the Deed of Trust.

1                   **1. ETS, AS A TRUSTEE ACTING PURSUANT TO CALIFORNIA CIVIL CODE §2924,**  
2                   **UNEQUIVOCALLY OWED CLAIMANT A DUTY**

3                   Under California law, the trustee has a duty to the Claimant herein, as an *equal*  
4 *agent of both the trustor and the beneficiary*. “As a common agent, the trustee must represent  
5 the interests of both parties.” *Ainsa vs. Mercantile Trust Co. Of San Francisco* (1917) 174 Cal.  
6 504, 510; *Ballengee vs. Sadlier* (1986) 179 Cal.App.3<sup>rd</sup> 1, 5; *Kerivan vs. Title Ins. & Trust Co.*  
7 (1983) 147 Cal.App.3<sup>rd</sup> 225, 229; Miller And Starr, *California Real Estate*, 3<sup>rd</sup> Ed., § § 10.4,  
8 10.117<sup>18</sup>; Bernhardt, *Mrtgages, Deeds of Trust, and Foreclosure Litigation*, 4<sup>th</sup> Ed., § 2.26.<sup>19</sup>  
9 48 California Forms of Pleading and Practice § 555.57 (1) (a).

10                  Moreover, “The trustee is liable to the parties for all damages resulting from its  
11 wrongful acts contrary to the terms of the deed of trust if its conduct is negligent, fraudulent,  
12 or illegal. For example, a trustee may be liable for damages for any unauthorized re-  
13 conveyance....” *Id.* citing *Kerivan supra*, *Fleisher vs. Continental Aux. Co.* (1963) 215 Cal.  
14 App.2<sup>nd</sup> 136, 140; *Woodworth vs. Redwood Empire Sav. & Loan Assn.* (1971) 22 Cal.App.3<sup>rd</sup> 347,  
15 366; *Bank of Seoul & Trust Co.* (1988) 198 Cal.App.3<sup>rd</sup> 113, 118.

16                  The Court in *Kerivan* stated:

17                         “In *Woodworth vs. Redwood Empire Sav. & Loan Assn.* (1971) 22 Cal.App.3<sup>rd</sup>  
18 347, 366, the court stated as follows: “It is well established, however, that a  
19 trustee under a deed of trust is not a trustee in the technical sense. Rather, he is  
the agent of all the parties to the escrow at all times prior to performance of the  
conditions of the escrow and *bears a fiduciary relationship to each of them.*”

20                  As an agent, the trustee may be liable for negligence in the performance of his duties. This  
21

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22                         <sup>18</sup> “A trustee may be liable for damages for wrongful reconveyance. The trustee is a common agent of both parties  
23 and is liable for any losses suffered as a result of any intentional or negligent breach of trustee duties.” citing *Carter vs.*  
*Continental Land Title Co.* (1991) 233 Cal.App.3<sup>rd</sup> 1597, 1599.

24                         <sup>19</sup> “The trustee has a *duty* to conduct the sale fairly and openly, with due diligence and sound discretion to protect  
25 the rights of the trustor and others...” citing *Baron vs. Colonial Mortgage Service Co.* (1980) 111 Cal.App.3<sup>rd</sup> 316, 322;  
*Kleckner vs. Bank of America* (1950) 97 Cal.App.2<sup>nd</sup> 30, 33.

1 principle was found applicable in *Munger vs. Moore* (1970) 11 Cal.App.3<sup>rd</sup> 1 where the court  
2 stated:

3 “That rule is that a trustee.....may be liable to the trustor..... for damages  
4 sustained where there has been an illegal, fraudulent or willfully oppressive  
5 sale of property under a power of sale contained in a mortgage or deed of  
6 trust. An agent has the duty to use reasonable skill and diligence and *if he*  
7 *violates this duty*, he is liable for any loss which his principal may sustain as  
8 the result of his negligence.” *Dahl-Beck Electric Co. vs. Rogge* (1969) 275  
9 Cal.App.2<sup>nd</sup> 893.”

10 The Trust argues that under California law, ETS acting as trustee was not a  
11 fiduciary. While that may be true in its strictest sense, debtor has neither argued or cited any  
12 case that stands for the proposition that only a fiduciary can breach a duty. And that is not the  
13 law. Put another way, debtor cannot cite to any California case which holds that a trustee does  
14 not owe a duty to a trustor such as Claimant herein.

15 As a general matter, in California:

16 “Duty is not sacrosanct in itself, but only an expression of the sum total of  
17 those considerations of policy which lead the law to say that the particular  
18 plaintiff is entitled to protection.” *Friedman vs. Merck & Co.* (2003) 107  
19 Cal. App.4<sup>th</sup> 454, 464. “The policy considerations to be taken into account  
20 in determining whether a duty is imposed by law were set forth in *Rowland*  
21 *vs. Christian* (1968) 69 Cal.2<sup>nd</sup> 108. “The major considerations are the  
22 foreseeability of harm to the plaintiff, the degree of certainty that the  
23 plaintiff suffered injury, the closeness of the connection between the  
24 defendant's conduct and the injury suffered, the moral blame attached to the  
25 defendant's conduct the policy of preventing future harm, the extent of the  
26 burden to the defendant and the consequences to the community of imposing  
a duty to exercise care with resulting liability for breach, and the availability,  
cost, and prevalence of insurance for the risk involved.” At P. 464.

27 Debtor relies for its argument that ETS did not owe a duty to Claimant on  
28 *Kachlon vs. Markowitz* (2008) 168 Cal.App.4<sup>th</sup> 316. This case is inapposite at best. Its factual  
29 pattern is incredibly complicated and is a will contest case, but what is abundantly clear is that  
30 whatever the trustee or substituted trustee did in *Kachlon*, it had the power to do it because  
31 it had been properly appointed. That is pointedly not the case here. Nothing in *Kachlon*  
32 stands for the proposition that a trustee does not owe a duty to trustor. The debtor cannot



1 point to one California case that holds that an improperly and illegally appointed trustee's  
2 actions were upheld. Quite the contrary is true; if improperly appointed, the trustee has no  
3 power to do anything, and any actions it takes are void *ab initio*. *Dimock vs. Emerald*  
4 *Properties* (2000) 81 Cal.App.4th 868.

5 The Trust also cites *Cedano vs. Aurora Loan Service* (470 BR 522) which it states  
6 holds that a substitute trustee did not breach a duty of care by alleging that the new trustee did  
7 not sufficiently ascertain the validity of the foreclosure documents. There is no such holding  
8 in this case. First, it is impossible to fully understand the case because the opinion is based on  
9 the underlying complaint, but that document is not available on PACER, making it impossible  
10 to adequately understand part of the opinion. The case is really about the MERS system and  
11 whether it had the authority to nominate a substitute trustee—nothing more. The Trust also  
12 relies on *Bascos vs. FHLMC* (CD Cal.) 2011 WL 3157063, and quotes a passage from the opinion  
13 allegedly on P. 7 thereof. That page is simply footnotes and no such quoted language exists  
14 therein. This case is also about the MERS system and its authority—issues not relevant to this  
15 discussion. Lastly, the Trust cites *Karimi vs. GMAC Mortgage* (ND Cal) 2011 WL 3360017,  
16 the Trust quotes the Court as stating that “trustees are not subject to a common law duty of  
17 care,” which is at odds with other courts cited herein, but finds no significance in the first part  
18 of the quoted language that “Although a trustee under a deed of trust...may be subject to  
19 statutory requirements...” The duty alleged herein is specifically statutorily based: Cal. Civil  
20 Code §2924 *et seq.* ETS admittedly violated this specific statute.

21 The Trust cannot have it both ways: it cannot, on the one hand, say there is no  
22 duty to abide by a statute, and on the other argue that although ETS is in violation of the  
23 statute, it is of no significance. It readily admits a violation of the statute—the statute which is  
24 central to California’s statutory scheme for nonjudicial foreclosures and must be strictly  
25 construed and adhered to—and then argue that such a violation simply does not matter.  
26

1 *Kachlon* was distinguished by *Perreault vs. NDEX West, LLC*, 2011 WL  
2 11682629. In the *Perreault* case, the plaintiff alleged violation of a subsection of Civil Code  
3 2924(the statute regarding trustees), the same statute that Claimant herein alleges was breached  
4 by debtor. Therein, the Court found a duty on behalf of the trustee. *Id.* at P. 5.<sup>20</sup>

5 There is simply no question that ETS, as trustee, was operating under a duty to  
6 act properly to Claimant. And debtor has not cited a single case, *decided by a California court*,  
7 *that so holds*.

8 Given the Trust's argument in this case, it is interesting to note that in another  
9 case, it argued just the opposite: that the trustee did have a duty to it, where ResCap was the  
10 plaintiff. *See Residential Capital, LLC vs. Cal-Western Reconveyance*(2003) 108 Cal.App.4th  
11 807. The Court summarized ResCap's argument thusly: " Residential Capital relies on this  
12 authority to argue that the trustee and beneficiary have a duty to third party buyers to exercise  
13 ordinary care in verifying the status of pending foreclosure sales before they go to auction."  
14 *Id.* at P. 176. This is Claimant's argument precisely. The Court held that there was a duty "...of  
15 a foreclosing trustee to ensure the sale is fairly conducted, according to proper  
16 procedures..."[citation omitted]. This duty runs to both the beneficiary and the trustor."

## 17 **2. ETS BREACHED THE DUTY IT OWED TO CLAIMANT.**

18 Although the Trust does not argue that it obviously breached its duty owing to  
19 claimant, it bears repeating here. It is beyond doubt that ETS was not properly substituted in  
20 as the new trustee, and therefore had no power to issue the requisite notices or to conduct the  
21  
22

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23 <sup>20</sup> And it distinguishes *Kachlon* thusly: "The relevant portion of that case discusses affording certain legal  
24 protections to the recording and filing of certain nonjudicial foreclosure documents, such as a Notice of Default. *See Kachlon*,  
25 168 Cal.App.4th at 343, 85 Cal.Rptr.3d 532 (affirming judgment in favor of defendant on negligence and slander of title  
26 claims where claims were based on defendant's recording of a Notice of Default). That authority does not, however, excuse  
NDEx's alleged failure to [abide by its statutory duties].

1 sale or to issue the trustee's deed.<sup>21</sup>

2 A leading treatise on California real estate, Bernhardt, *California Mortgages,*  
3 *Deeds of Trust and Foreclosure Litigation*, 4<sup>th</sup> Ed., §2.25 states: "A party who is not a trustee  
4 of record will not have the authority to conduct the foreclosure or deliver a valid trustee's  
5 deed." *See also Pro Value Props., Inc. Vs. Quality Loan Service Corp.* (2009) 170 Cal.App. 4<sup>th</sup>  
6 579.

7 The debtor cannot argue that it would have been too difficult to discover that it  
8 did not have the power of sale(as in *Kachlon*). As it states in its brief, it set forth recorded  
9 documents which are easily obtainable online.

### 10 3. ETS'S BREACH CAUSED HARM TO CLAIMANT

11 The Trust argues that damages did not flow from anything that ETS did, stating  
12 that "because ETS's recording of the Notices did not cause the commencement of the  
13 foreclosure process, ETS's actions cannot be the cause of Mr. Moss's alleged damages." This  
14 is a patently false and disingenuous statement. Under the statute, it was the recording of the  
15 notice of default that did cause the commencement of the foreclosure process. *See* Cal. Civil  
16 Code §2924a. Otherwise, under the statute, the process doesn't start. It is precisely because  
17 ETS filed the Notices, without authority—easily discovered—and evidently without being  
18 requested to do so by the beneficiary—actually the alleged beneficiary, since that assignment  
19

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20  
21 <sup>21</sup> As set forth above, the entity who attempted to substitute in ETS was not yet the beneficiary, and wouldn't  
22 become the beneficiary for a year, and had no power to do so. Therefore, ETS could not do anything: it had no power. "No  
23 non-judicial foreclosure of a security interest in real property is permitted except in compliance with this statutory system.  
Cal.Civ.Code §2924....Strict compliance with the statutory requirements is obligatory: any statutory deficiency requires that  
the sale be set aside, provided that the purchaser is not a bona fide purchaser for value without notice of the deficiency.  
*Anderson vs. Heart Federal Savings*(1989) 208 Cal.App.3<sup>rd</sup> 202." *In Re Tome* (1990) 113 B.R. 626, Bkrtcy C.D. Cal.

24 Because ETS was not duly substituted in as the trustee, ETS had no authority, *ab initio* or ever, to this day, to  
25 issue the Notice of Default, or the Notice of Trustees Sale, or the Trustees Deed by which defendant purports to claim title.  
26 ETS was named as trustee in derogation of this statute, because it was not named or substituted by a beneficiary of the deed  
of trust.



1 was also erroneously done—that the process started and continued to finality.<sup>22</sup>

2 Further, debtor's rendition of the facts is also erroneous and disregards the  
3 litigation below. ETS went ahead with a sale of claimant's home *after* claimant and ResCap  
4 entered into an agreement, complied with by claimant, that took the matter out of default. ETS  
5 totally, for whatever reason, disregard this and went ahead with the sale. It took four years plus  
6 to undo ETS's illegal actions.

7 Lastly, debtor makes the uninformed statement that Claimant did not pay his  
8 mortgage(it wasn't a mortgage) which resulted in the commencement of foreclosure and  
9 therefore can't show that his damages were caused by ETS. First, there is no authority for this  
10 statement, and none can be given because it isn't the law. Second, at the time of the  
11 foreclosure, there was no default and debtor has merely argued a heresay statement. As pointed  
12 out above, the debtor has admitted that there was supposed to be no sale. Third, even if there  
13 was a default, that cannot possibly excuse a violation of California law, especially where it has  
14 been repeatedly held that the procedural aspects of the foreclosure process must be "strictly  
15 adhered to." Is the debtor's argument something like "Because Claimant *supposedly* missed  
16 a payment(s), we could then violate California law?" If a negligent driver sustains injuries as  
17 a result of his driving, is that a defense as to a physician who thereafter negligently treats him  
18

19 <sup>22</sup> As explained above, *before* ETS could issue any notices or conduct a property sale, it had to first ascertain  
20 whether it was *empowered* to act as the lawful trustee to actually do these acts. This was neither a difficult task, nor so  
21 convoluted that ETS could not have figured it out or done it. After all, this was their business, and on information and  
22 belief, it existed solely to service the actions of ResCap. All they had to do was go online and look at the very recorded  
documents that debtor has attached in support of its instant motion. And evidently, all that ETS did, as a wholly-owned  
subsidiary of ResCap, was to initiate and carry out this process.

The fact is, as explained above, was that ETS was not duly substituted in as trustee, and would not, for at least  
a year, be so empowered—if then.

To hold otherwise would be to conclude that an entity could act as trustee with-out ever checking on who had To  
hold otherwise would be to conclude that an entity could act as trustee with-out ever checking on who had appointed them,  
when, and whether they had such power to affect so dramatically peoples lives. Some entity, whether or not the owner of  
a loan, could just place a call or write a letter and say "Start the foreclosure process. Send out a notice." Of course, that  
cannot possibly be the legislative intent when these statutes were adopted, and especially where the process is supposed to  
be strictly adhered to.

1 for those injuries? Of course not.

2           The Trust primarily relies on *Bergman vs. Bank of America* (ND Cal 2013) 2013  
3 WL 5863057. First this is a pleading stage case, so that the standards are quite different from  
4 deciding a summary judgment motion. Second, the Trust misrepresents the holding of this case.  
5 It quotes language to support its argument that only applies to Bank of America, the beneficiary  
6 in this case, and not to the trustee, Trustee Corps. As to the trustee, the Court stated and held  
7 that: "Plaintiffs have not plausibly alleged that Trustee Corps was aware, or should have been  
8 aware, that it was not validly the trustee when it recorded these documents....because Bank of  
9 America was not the beneficiary, and thus Trustee Corps was not the trustee, at the time the  
10 SOT was executed....plaintiffs have not pled facts to suggest that Trustee Corps should have  
11 been able to discover Bank of America's alleged lack of authority." That is decidedly different  
12 than this claim where it is specifically alleged *and factually certain* that ETS could have easily  
13 discovered it was not properly and legally substituted as the trustee.

14           Further, inherent and subsumed in the holding of the District Court in *Bergman*  
15 is the conclusion that *if Trustee Corps could have discovered it was not properly substituted*  
16 *as trustee, the result would have been different*. It is patently clear from the facts of this case  
17 that Trustee Corps could not have possibly discovered this fact from the evidence available  
18 to it. *There is no factual dispute in the instant Claim that ETS could have discovered their*  
19 *lack of authority in five minutes*.

20           The Trust's further argument re: *Bergman*, that an *alleged* default (there is a  
21 dispute about this, which the Trust keeps throwing around as a proven fact) gave the "owner  
22 of his loan" (the Trust uses this language because it was not the owner of the loan when it  
23 supposedly commenced the process—BONY was improperly assigned the loan and it was of no  
24 force or effect), the right to commence foreclosure proceedings. The Trust does not, and  
25 cannot, argue that this fact alone gave an entity the right to violate California law, as it did here.

26



1 Debtor relies on the case of *Freeman vs. King*, 2007 WL 1289810 for authority for  
2 their novel proposition. They cannot do so. This California appellate case is ***not citable as***  
3 ***authority***.<sup>23</sup> The second line of the Westlaw version states: "Not Officially Published (Cal. Rules  
4 of Court, Rule 8.1105 and 8.1110, 8.1115)" and then states "California Rules of Court, Rule  
5 8.1115, restricts citation of unpublished opinions in California courts."<sup>24</sup> This California case  
6 is not citable in any California court or any other court.

7 Lastly, a part of this Claim (attached to the Trust brief at Exhibit N is the  
8 Declaration of the undersigned that was filed in San Mateo County Superior Court as part of  
9 the process in obtaining a default judgment.<sup>25</sup> The harm to Claimant flowed not only from the  
10 foreclosure process itself, but from the actions of what can only be called thugs, hired by  
11 ResCap and ETS, to attempt to frighten Claimant out of his home—including disobeying a Court  
12 Order, attempting to proceed with an eviction proceeding notwithstanding that it had been  
13 stayed previously by the Superior Court. If the Claimant had not suspected this attempt and  
14 appeared, ResCap would have obtained such an Order, and done so in part on the proven lies  
15 under oath of the process server who never served the appropriate papers. ResCap attempted  
16 to circumvent the law, and had it been successful, would have been impossible to unravel.

#### 17 4. NEGLIGENCE *PER SE*

18 The Trust objects to the negligence *per se* cause of action notwithstanding it was  
19 not part of its request for a summary judgment motion. Essentially, it argues for the reasons  
20 previously stated, that there is no duty owed on the part of ETS.

---

21  
22 <sup>23</sup> Claimant therefore moves to strike any mention of, or reliance on this case.

23 <sup>24</sup> California Rule Of Court 8.1115:  
24 (A) Unpublished Opinions  
"Except as provided in (b), an opinion of a California Court of Appeal .....that is not certified for publication or ordered  
published must not be cited or relied on by a court or a party in any other action.

25 <sup>25</sup> See ECF Doc. # 10290-15, filed as part of this instant motion.  
26

1 For the reasons argued hereinabove, this is incorrect. And its cited case of  
2 *Maomanivong vs. National City Mortgage*(ND Cal.) 2014 WL 4623873 does not change this  
3 argument. It cites language on P. 16 which does not appear in the Opinion.

4 And its reliance on *Le Beau vs. Bank of America*, 2014 WL 4809843 is also  
5 misplaced. First, this case is non-citable per the California Rules of Court, as stated on its first  
6 page in WestLaw. Second, the Trust also mistates the supposed holding of the case. The  
7 opinion's denial of this claim was based solely on an unrelated provision of California law: That  
8 as a general rule, a financial institution owes no duty of care to a borrower when the institution's  
9 involvement in the loan transaction does not exceed the scope of its conventional role as a mere  
10 lender of money. This has no application to a trustee such as ETS.

11 **5. EMOTIONAL DAMAGES LIE EVEN ABSENT PHYSICAL HARM/NEGLIGENT**  
12 **INFLECTION OF EMOTIONAL DISTRESS**

13 The Trusts protestations notwithstanding, physical harm is not a requirement in  
14 California to be awarded damages for negligent infliction of emotional distress. California  
15 recognizes a right to recover damages for serious emotional distress in a negligence action.  
16 *Molien vs. Kaiser Found. Hosp.*(1980) 27 Cal.App.3<sup>rd</sup> 916, 930. A plaintiff may recover general  
17 damages for emotional distress, pain and suffering, along with other compensatory damages.  
18 *Merrill vs. Los Angeles Gas & Elec. Co.*(1910) 158 Cal. 499, 511; *Niles vs. City of San Rafael*  
19 (1974) 42 Cal.App.3<sup>rd</sup> 230, 244. See Witkin, 4 *Summary of California Law*, 10<sup>th</sup> Ed. § 1022.

20 Negligent infliction of emotional distress refers to the recovery of damages by a  
21 plaintiff who has not otherwise suffered any physical or bodily injury, for emotional dis-tress  
22 arising from a defendant's negligent conduct. *Molien, supra* at 924. In 1980, the California  
23 Supreme Court abolished the "physical injury" requirement. *Molien supra*, 930; *Potter vs.*  
24 *Firestone Tire and Rubber* (1993) 6 Cal.4<sup>th</sup> 965, 986. Under this rule, one may recover for  
25 emotional distress suffered as the result of a negligent act that placed the plaintiff in fear for his  
26

1 personal well-being, regardless of whether there is any physical impact and regardless of  
2 whether the emotional distress is accompanied by any physical manifestation of injury. *Molien*  
3 *supra* at 924; *Burgess vs. Superior Court* (1992) 2 Cal.4<sup>th</sup> 1064, 1074.<sup>26</sup> Damages for emotional  
4 distress may be recovered in a tort action for fraud. *Branch vs. Homefed Bank* (1992) 6  
5 Cal.App.4<sup>th</sup> 793, 799.

6 Further, all detriment proximately caused by the breach of a duty imposed by  
7 statute, as here, is compensable, including damages of emotional distress. *Pintor vs. Ong* (1989)  
8 211 Cal.App.3<sup>rd</sup> 837, 841. It is not necessary that the plaintiff suffer other injury in addition to  
9 the emotional distress. *Pintor supra* at 845. For example, damages for emotional distress have  
10 been awarded for a breach of the duty imposed by Cal. Civil Code §2941, requiring  
11 reconveyance of real property after a debt secured by a deed of trust has been satisfied.  
12 *Pintor* at 841; this is part of the statutory scheme imposing a duty on trustees.

13 In California, the courts have adopted a unitary concept of pain and suffering,  
14 without attempting to bifurcate them, and this term has been used and applied to a plaintiff who  
15 may recover not only for physical pain but also for fright, nervousness, grief, anxiety, worry,  
16 mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal.  
17 *Capelouto vs. Kaiser* (1972) 7 Cal. 3<sup>rd</sup> 889, 893. Medical testimony is not required. No definite  
18 method of calculation is prescribed by law by which to fix compensation for pain and suffering.  
19 It is required only that the award be just and reasonable in light of the evidence. *Garfoot vs.*  
20 *Avila* (1989) 213 Cal.App.3<sup>rd</sup> 1205. Lastly, a jury may compute pain and suffering damages by the  
21 per diem method by which damages are measured in terms of a stated number of dollars for  
22 specific period of time. *Beagle vs. Vasold* (1966) 65 Cal.2<sup>nd</sup> 166, 173.

23 This is exactly what Claimant did in calculating his damages. Although criticized  
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25 <sup>26</sup> See 32 California Forms of Pleading and Practice §362.11 *et seq.*  
26

1 by debtor, this is perfectly allowable in California. And the calculations were based on the  
2 severe emotional distress and shock as this matter was unrolling. *See* Declaration of Alan Moss  
3 filed herewith.

4 Claimant's right to emotional distress damages is clearly mandated by *Munger*  
5 *vs. Moore* (1970) 11 Cal.App.3<sup>rd</sup> 11, which held: "The measure of damages for a wrong other than  
6 breach of contract will be an amount sufficient to compensate the plaintiff for all detriment,  
7 foreseeable or otherwise, proximately occasioned by the defendant's wrong."

8 In *Spinks vs. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4<sup>th</sup>  
9 1004, 1040, a wrongful eviction case, the Court stated: "The recovery includes all consequential  
10 damages occasioned by the wrongful eviction (personal injury, including infliction of emotional  
11 distress, and property damage), and upon a proper showing of malice, punitive damages."

12 Debtor's reliance on *Friedman, supra*, is misplaced and whose connection with  
13 this instant case is attenuated at best, especially keeping in mind the *Rowland* factors.  
14 *Friedman* is a complex case wherein a vegan underwent a medical procedure, after asking and  
15 being told that there were no animal products involved. It is hard to imagine a case further away  
16 from this case, where the debtor admittedly violated a statutory duty.

17 Nor does its reliance on the only other case it cites, fare any better. *Smith vs.*  
18 *Superior Court* (1992) 10 Cal.App.4<sup>th</sup> 1033 is at least as attenuated from the case at bar as  
19 *Friedman*. This is a legal malpractice case, arising from a divorce. This case holding is  
20 restricted to legal malpractice cases.

21 But if it were broader, its holding is that emotional distress damages are  
22 recoverable where there is an allegation of intentional or affirmative misconduct. Claimant's  
23 complaint alleges just such activity.

#### 24 C. FRAUD

25 The Trust argues that Claimant cannot demonstrate that he suffered the damage  
26



1 element required of fraud because the statutory notices *illegally* issued by ETS, and which then  
2 caused significant and continuing damage to Claimant, have been withdrawn. Further, debtor  
3 argues that any damages incurred in fighting and reversing the foreclosure was caused, not by  
4 the illegal actions of the debtor itself, but by Claimant's default.

5 This argument is an affront to logic, propriety, the law, and just common sense  
6 and decency. And it ignores the basic facts that ETS acted illegally and in contravention of the  
7 California statutes when it did issue these two notices (Notice of Default and Notice of Trustee  
8 Sale) and, after selling Claimant's home, conveying the trust deed to the bank. That the notices  
9 have been withdrawn, and that Claimant's home has been returned to him *does not obviate all*  
10 *of the damage, including extreme emotional damage he incurred for the three plus years of*  
11 *litigating against a major corporation, with unlimited assets, to accomplish this. It is beyond*  
12 *cavil that the debtor would not have rescinded the notices nor reversed the sale absent this*  
13 *enormous amount of litigation.* Perhaps if debtor could demonstrate to this court that it  
14 voluntarily admitted its mistakes, withdrew these notices and reversed the sale of Claimant's  
15 home, thereby not necessitating all of this litigation, that might be one thing. But that is not the  
16 case or the truth. The fact is that debtor used every means at its disposal to attempt to bury  
17 Claimant, and did so for a period exceeding three years. Debtor attempts to circumvent this by  
18 arguing that the beneficiary was not ResCap, but this is fallacious at best. It was ResCap, as  
19 the servicer, who conducted this litigation, forced it to go on and on, and refused to concede  
20 the most basic facts which have now been admitted in this matter.

21 Likewise, even if Claimant was in default, which he wasn't, that did not cause ETS to violate  
22 the law. That violation, which caused all of claimant's damages, occurred only because of  
23 debtor's callous disregard for California law. Second, the debtor offers no competent evidence  
24 to this Court that the Claimant was in default at the time of these actions. Therefore, this  
25 argument is of no avail. And it cannot. Third, the argument ignores that Claimant has proved  
26

1 the elements necessary for fraud. Fourth, Claimant has set forth compensable damages. See  
2 Declaration of Alan Moss, filed herewith. Thus, Debtor has not advanced any theory to defeat  
3 the Fraud cause of action, and the damages flowing therefrom.

4 **6. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS(IIED)**

5 Lastly, debtor argues that Claimant cannot assert a cause of action for IIED,  
6 relying on *Aguinaldo vs. Ocwen Loan Serv. LLC* 2012 WL 3835080, which in turn relied on  
7 *Davenport vs. Litton Loan Servicing* (N.D. Cal. 2010) 725 F. Supp. 2d 862; *Mehta vs. Wells Fargo*  
8 *Bank* (N.D. Cal. 2010) 737 F. Supp. 2d 1185; and *Ottovich vs. Washington Mutual* (2010) 2010 WL  
9 3769459.

10 These cases are inapposite to this instant case. The holdings of these cases are  
11 necessarily limited to the facts of the cases.

12 In *Aguinaldo*, the allegations of the case were, according to the Court,  
13 “conditional” promises and therefore unable to support a classification of outrageous conduct.  
14 In *Davenport*, the Court found the allegations of “certified mail failure and the refusal, after  
15 meeting with her and her legal representative to modify her loan also do not, *by themselves*,  
16 qualify as outrageous....” (P. 884, emphasis supplied). In *Mehta*, the Court found only a  
17 conditional promise to forestall a sale. In *Ottovich*, the IIED claim was dismissed because it was  
18 inadequately pled, and plaintiff was allowed to amend.

19 Thus, two of the four cases were allowed to amend, and all were found to be  
20 insufficient because of “conditional” promises and inadequate specificity.

21 Not one of these cases rises to the level of the instant case, wherein ETS deli-  
22 berately and intentionally violated California statutes controlling the activities of trustees. This  
23 is categorically different than, and far more serious than, these four cases. None of them  
24 pointed to a violation of California law or could.

25 Therefore, these cases are not authority to hold that Claimant cannot obtain  
26

1 damages for IIED.

2 Further, the allegations of the complaint, that ETS intentionally violated state law  
3 with the intent to harm Claimant, have to be taken as true for this motion. As pointed out  
4 above, the District Court ruled that the IIED cause of action was viable in the underlying case.

5 Behavior may be considered outrageous if a defendant (1) abuses a relation or  
6 position that gives him power to damage the plaintiff's interest; (2) know the plaintiff is  
7 susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with  
8 the recognition that the acts are likely to result in illness through mental distress. *Agarwal vs.*  
9 *Johnson* (1979) 25 Cal.3rd 932, 946. Neither physical injury or monetary loss is required to be  
10 actionable. *Grimes vs. Carter* (1966) 241 Cal.App.2nd 694.

11 Severe emotional distress was found to exist in *Fletcher vs. Western Nat. Life Ins.*  
12 *Co.* (1970) 10 Cal.App.3rd 376 even though testimony showed the plaintiff suffered no shock,  
13 horror, or similar physical effects and that most of his distress resulted from his unfortunate  
14 economic situation. The Court held it may "consist of any highly unpleasant mental reaction  
15 such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, dis-appointment, and  
16 worry." P. 397. When this involved losing his home, all continuing for many months, this was  
17 adequate for IIED.<sup>27</sup>

### 18 CONCLUSION

19 For the foregoing reason, claimant respectfully requests that the motion be denied.

20 Dated: February 6, 2017

Respectfully Submitted,

21  
22 ALAN MOSS

23 Attorney In Propria Personum  
24

25 <sup>27</sup> See Witkin, 5 Summary of California Law, §452.  
26





**PROOF OF SERVICE**

**COURT: U.S. BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

**CASENAME: RESCAP**

**ACTION NO.: BANKRUPTCY NO. 12-12020-MG(SDNY)**

I am employed in the County of San Francisco, California. I am over the age of 18 and not a party to the within action. On this date, I served the following:

Claimants Response To Debtor's Motion For Summary Judgment, Claimant's Response To Debtor's 7056-1 Document, Declaration of Alan Moss

on the party(ies) set out in said document by causing a true copy thereof to be:

- ☐ Telecopied via facsimile to the addressee's facsimile number listed below per CRC 2008(b).
- ☐ Telecopied via facsimile to the addressee's telephone number listed below, and thereafter mailed according to the procedures set forth immediately hereinbelow.
- ☒ By U.S. priority OVERNIGHT mail, by placing said document(s) in a sealed envelope with postage thereon fully prepaid, and then deposited in a U.S. Post Office.
- ☐ By U.S. mail, Return Receipt Requested, by placing said document(s) in a sealed envelope with appropriate postage thereon fully prepaid and then placed in the designated office area for outgoing mail.
- ☐ Delivered by hand to the person set forth below, or by handing said document in a sealed envelope to a messenger service for delivery as addressed.
- ☐ Sent via Priority overnight mailing, by handing said document in a sealed envelope to an agent for the USPS for overnight delivery.

and if mailed, addressed as follows and sent to the following address(es):

Hon. Martin Glenn (Chambers Copy)  
Judge of the U.S. Bankruptcy Court in and for the  
Southern District of New York  
Alexander Hamilton Custom House  
One Bowling Green  
New York New York 10004-1408

Clerk's Office (Filing Copy)  
U.S. Bankruptcy Court in and for the  
Southern District of New York  
Alexander Hamilton Custom House  
One Bowling Green  
New York New York 10004-1408

Morrison and Foerster LLP

1 ATTN: Norman S. Rosenbaum  
2 250 West 55<sup>th</sup> Street  
3 New York New York 10019

4 I declare under penalty of perjury under the laws of the State of California that the  
5 foregoing is true and correct.

6 Executed this 6th day of February, 2017, at San Francisco, California.